UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
VITAMINS ANTITRUST LITIGATION	)	
	)	
	)	**Misc. No. 99-0197 (TFH)**
	)	
THIS DOCUMENT RELATES TO:	)	
ALL DIRECT ACTIONS,	)	

ORDER
Re: Defendants' Emergency Motion for a Stay of the Court's January 9, 2003 Order

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the defendants' emergency motion for a stay pending appeal of the Court's January 9, 2003 Order is **DENIED;** it is further hereby

ORDERED that the defendants' alternative request for an interim stay is **DENIED.**

SO ORDERED.

January 24, 2003

Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
VITAMINS ANTITRUST LITIGATION	)	
	)	
	) **Misc. No. 99-0197 (TFH)**	FILED
	)	
THIS DOCUMENT RELATES TO:	)	JAN 24 2003
ALL DIRECT ACTIONS,	)	

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION Re: Defendants' Emergency Motion for a Stay of the Court's January 9, 2003 Order

Pending before the Court is the emergency motion of defendants F. Hoffman-La Roche Ltd, Hoffman-La Roche Inc. and Roche Vitamins Inc. (collectively "Roche") and defendants BASF Aktiengesellschaft ("BASF AG") for a Stay Pending Appeal of the Court's January 9, 2003 Order which requires production of the source materials used by the defendants to create their Rule 30(b)(6) statements. Upon careful consideration of the defendants' motion, the opposition and reply thereto, and the entire record herein, the Court will deny the defendants' motion for a stay pending appeal and will deny defendant's alternative request for an interim stay to afford the defendants the opportunity to seek a stay from the Court of Appeals. The Court will also order the defendants to comply with the Court's January 9, 2003 Order no later than January 27, 2003.

DISCUSSION

A. Legal Standard

Whether to grant a stay pending appeal requires the Court to consider four factors: (1) whether the defendants are likely to succeed on the merits of an appeal; (2) whether the defendants will suffer irreparable harm if the stay is denied; (3) whether the issuance of a stay

would substantially harm the other parties; and, (4) whether the public interest will be served by the issuance of the stay. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc. 559 F2d 841, 843 (D.C. Cir 1977). The movants bear the burden of establishing that these factors are met.

B. Analysis

(1) The Court must first consider whether the defendants are likely to succeed on the merits of their appeal. The Rule 30(b)(6) statements in question were submitted in response to deposition topics on the defendants' corporate knowledge regarding the vitamins conspiracy alleged by plaintiffs and were intended, in most cases, to substitute for live testimony. These 30(b)(6) statements were drafted by lawyers and the documents underlying the statements at issue today are the typewritten and handwritten memoranda by the defendants' counsel of interviews by governmental authorities of the defendants' employees. The issue of whether the defendants must produce the source materials underlying the 30(b)(6) statements began with plaintiffs April 8, 2002 motion to compel. After a series of lengthy and fact-intensive briefs and oral arguments, and Fed. R. Civ. P. Rule 53 objections, the Court determined that plaintiffs had demonstrated substantial need as required to overcome the protections of attorney fact work product under Fed. R. Civ. P. 26(b)(3). In adopting the recommendations of the Special Master in the October 21, 2002 Memorandum Opinion, the Court noted that the finding of substantial need was based on evidence that "many of the documents related to the conspiracy has been destroyed ... that many witnesses whose testimony was recorded in the materials have now asserted their Fifth Amendment rights, depriving plaintiffs the opportunity to depose them, and most importantly, on the fact that inconsistencies and equivocations in the [Rule 30(b)(6)]

statements cannot be answered through depositions of individuals with contemporaneous knowledge." Oct. 21, 2002 Mem. Op. at 4. Further, *in camera* review conducted by the Special Master and whose recommendations were adopted in the Court's January 9, 2003 Order resulted in some redactions where it was determined that the attorney work product was opinion rather than fact work product.

After such protracted and detailed litigation and in light of the materials produced by the Rhone-Poulenc Defendants who were also subject to the January 9, 2003 Order, the Court cannot say that there is a substantial likelihood of succesSon the merits of the appeal. In fact, if the source materials of the Roche and BASF defendants are at all similar to those produced by the Rhone-Poulenc defendants in compliance with January 9 Order, the Court is even further convinced of plaintiffs' substantial need for the documents. See Pl. Opp'n to Def. Emer. Mot., Ex. 3.

Moreover, the Court is not convinced that the Court of Appeals would have jurisdiction over the appeal of this discovery order as it is not a final order as required by 28 U.S.C. §1291. The Court does not find that requirements of the collateral order doctrine - a narrow exception to the final judgment - have been met, see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 542 (1949), even in light of the Circuit's recent decision in United States v. Phillip Morris Inc., No. 02-5210 (D.C. Cir. January 7, 2003). In Phillip Morris, the court held that an order requiring a party to produce a document allegedly protected by the attorney-client privilege is immediately appealable under Cohen. The court determined that the attorney-client privilege was the type of "institutionally significant status or relationship" that justifies collateral review because the privilege encourages full and frank communications between attorneys and their client thus

promoting sound legal advocacy. Phillip Morris, No. 02-5210, slip op. at 7 - 8. The court determined that protecting this privilege outweighed the costs of delay and piecemeal review that result from allowing review under the collateral order doctrine.

In this case, the defendants are seeking interlocutory review of a discovery order requiring them to produce documents which they claim are protected by the attorney work product privilege. The purposes of this privilege are distinctly different from that of the attorney-client privilege as the attorney work product privilege is designed to facilitate the adversary system by preventing "exploitation of a party's efforts in preparing for litigation." Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Ariz., 881 F.2d 1486, 1494 (9th Cir. 1989). Further, the work product privilege is not absolute, and a party may obtain fact work product, such as the documents at issue here, upon the showing of substantial need. Fed. R. Civ. P. 26 (b)(3). The cost of delay stemming from review of a discovery order concerning attorney fact work product outweigh any interest sought to be protected by immediate appellate review.

Surely the Court of Appeals in Phillip Morris did not intended to relax the stringent requirements of the collateral order doctrine to open a Pandora's box of last minute appeals of discovery orders whenever a party zealously asserts privilege. This could have devastating effects on any civil action, as it would needlessly complicate, prolong, and add expense to any case, and in some instances, it would reward the recalcitrant party who seeks to employ a strategy of delay. The effects of relaxing the stringent requirements of Cohen would especially be felt in large, complex actions such as multidistrict litigation where parties have vast resources at their disposal.

(2) The Court must next consider whether the defendants would suffer irreparable harm if the

stay is denied. The Court has determined that plaintiffs have made a showing of substantial need for the source materials and has ordered the materials produced with opinion work product and non-responsive information redacted. The defendants assert that the irreparable harm is "self-evident" and the uses to which the plaintiffs may put the information can never be remedied on appeal. The Court is not convinced by the logic of the defendants argument which, without more, could apply to virtually every discovery order issued by a district court. Moreover, the Special Master and this Court have taken great care to ensure that opinion work product and non-responsive information will not be produced. The Court thus concludes that the defendants will not suffer irreparable injury by turning over the redacted source materials.

(3) As to injury to other parties, the Court concludes that the plaintiffs would suffer substantial harm if the stay were granted. This multidistrict litigation is on the eve of trial and remand for cases not being tried in this district is set for February 15, 2003. The trial in this district will begin on March 12, 2003. These rapidly-approaching dates follow more than three years of extensive litigation over numerous discovery disputes. The Court has determined that plaintiffs have substantial need for these materials. Plaintiffs have already been forced to respond to numerous motions for summary judgment without the benefit of these materials. To force plaintiffs go to trial without the materials or to allow the litigation to come to a grinding halt would undoubtedly inflict substantial harm on the plaintiffs. It would add substantial costs and further delay to the litigation and would deprive plaintiffs of potentially highly relevant and powerful evidence of the conspiracy they must prove.

(4) Lastly, the Court must determine whether granting a stay would serve the public interest. Unlike the attorney-client privilege at issue in Phillip Morris, the goals of the attorney work

product privilege will in no way be diminished if the stay is denied. In fact, the public interest will served if this litigation is kept on track with the remand date and trial date going forward. The Court, courts in other districts, and the parties have devoted substantial resources to this case. Indeed, other parties litigating other cases have been affected by the schedule in this multidistrict litigation. Therefore, the Court finds that granting a stay would not serve the public interest.

In the alternative to a stay pending appeal, the defendants have requested an interim stay of the Court's January 9, 2003 Order to afford it the opportunity to seek a stay from the Court of Appeals. The Court finds no reason to grant such a request. The resolution of an appeal, even an expedited appeal, could delay not only the trial to be held in this Court but litigation scheduled for remand to other districts for a significant period.[1] All the parties in this case have worked to prepare for trial, and trial in this case is set to commence on March 12, 2003. Granting any stay would jeopardize the Court's and the parties' abilities to proceed as scheduled.

[1] The Court notes that a similar appeal filed in the D.C. Circuit in Phillip Morris case was filed in July 2002, oral argument was heard in September 2002, and an opinion issued in January 2003.

CONCLUSION

For the foregoing reasons, the Court does not find that the defendants are likely to succeed on the merits of the appeal of the January 9, 2003 Order or that the defendants will suffer irreparable harm if the stay is denied. In addition, the Court finds that the plaintiffs will be harmed by further delay and that the public interest will not be served if the stay pending appeal is granted. Accordingly, the Court will deny the defendants' emergency motion for a stay pending appeal of the January 9 Order. The Court will also deny the defendants' motion for an interim stay. An appropriate order will accompany this Memorandum Opinion.

January 24, 2003

Thomas F. Hogan
Chief Judge